RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
OCT 31 2016
OFFICE OF THE CLERK

No. 16-142

In the Supreme Court of the United States

TERRY MICHAEL HONEYCUTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 21 U.S.C. 853(a)(1) renders the members of a drug conspiracy jointly and severally liable for the forfeiture of the reasonably foreseeable proceeds of the conspiracy.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 23

TABLE OF AUTHORITIES

Cases:

Alexander v. *United States*, 509 U.S. 544 (1993) 17
Libretti v. *United States*, 516 U.S. 29 (1995) 9
Paroline v. *United States*, 134 S. Ct. 1710 (2014) 17, 18
Pinkerton v. *United States*, 328 U.S. 640 (1946) 10, 11, 15, 16
Salinas v. *United States*, 522 U.S. 52 (1997) 11, 15
Smith v. *United States*, 133 S. Ct. 714 (2013) 10, 16
United States v. *Bajakajian*, 524 U.S. 321 (1998) 6
United States v. *Benevento*, 836 F.2d 129 (2d Cir. 1988) 12
United States v. *Browne*, 505 F.3d 1229 (11th Cir. 2007), cert. denied, 554 U.S. 918 (2008) 12
United States v. *Bucci*, 582 F.3d 108 (1st Cir. 2009) 9
United States v. *Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999), cert. denied, 529 U.S. 1055 (2000) 12
United States v. *Cano-Flores*, 796 F.3d 83 (D.C. Cir. 2015), cert. denied, 136 S. Ct. 1688 (2016) ..... *passim*
United States v. *Caporale*, 806 F.2d 1487 (11th Cir. 1986), cert. denied, 482 U.S. 917, and 483 U.S. 1021 (1987) 12, 13
United States v. *Casey*, 444 F.3d 1071 (9th Cir.), cert. denied, 549 U.S. 1010 (2006) 9

Cases—Continued: Page

United States v. *Christensen*, 828 F.3d 763 (9th Cir. 2015), petition for cert. pending, No. 16-461 (filed Oct. 5, 2016) 10
United States v. *Corrado*, 227 F.3d 543 (6th Cir. 2000) 7, 12
United States v. *DeFries*, 129 F.3d 1293 (D.C. Cir. 1997) 10
United States v. *Edwards*, 303 F.3d 606 (5th Cir. 2002), cert. denied, 537 U.S. 1192, and 537 U.S. 1240 (2003) 12
United States v. *Elder*, 682 F.3d 1065 (8th Cir. 2012) 12
United States v. *Genova*, 333 F.3d 750 (7th Cir. 2003) 10, 12
United States v. *Hurley*, 63 F.3d 1 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996) 10, 12, 14, 16, 17, 20
United States v. *Jarrett*, 133 F.3d 519 (7th Cir.), cert. denied, 523 U.S. 1112 (1998) 9
United States v. *Keeling*, 235 F.3d 533 (10th Cir. 2000), cert. denied, 533 U.S. 940 (2001) 9
United States v. *Lake*, 472 F.3d 1247 (10th Cir. 2007) 11, 15
United States v. *Logan*, 542 Fed. Appx. 484 (6th Cir. 2013), cert. denied, 134 S. Ct. 1531 (2014) 21
United States v. *McHan*, 101 F.3d 1027 (4th Cir. 1996), cert. denied, 520 U.S. 1281 (1997) 9, 11, 12
United States v. *Monsanto*, 491 U.S. 600 (1989) 9
United States v. *Olguin*, 643 F.3d 384 (5th Cir.), cert. denied, 132 S. Ct. 432, and 132 S. Ct. 439 (2011) 9, 10
United States v. *Pitt*, 193 F.3d 751 (3d Cir. 1999) 12
United States v. *Roberts*, 660 F.3d 149 (2d Cir. 2011), cert. denied, 132 S. Ct. 1640 (2012) 12

Case—Continued: Page

United States v. *Simmons*, 154 F.3d 765 (8th Cir. 1998) 10, 12

Constitution, statutes, guideline and rule:

U.S. Const. Amend. VIII 5
Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, Tit. II, ch. III, 98 Stat. 2040 8
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* 6
18 U.S.C. 1963(a)(3) 7
18 U.S.C. 982(a)(2) 13
18 U.S.C. 982(a)(8)(B) 13
18 U.S.C. 1030(i)(1)(B) 13
18 U.S.C. 3664(h) 15
21 U.S.C. 841(c) 2
21 U.S.C. 841(c)(2) 1
21 U.S.C. 843(a)(6) 2
21 U.S.C. 846 ..... 1, 2
21 U.S.C. 853 ..... *passim*
21 U.S.C. 853(a) 8, 21
21 U.S.C. 853(a)(1) ..... *passim*
21 U.S.C. 853(*o*) 9, 17
21 U.S.C. 853(p) 10
United States Sentencing Guidelines § 1B1.3(a)(1)(B) 16
Fed. R. Crim. P. 32.2(c) advisory committee's note at 144 13

Miscellaneous:

S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 8, 9, 13

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 816 F.3d 362.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 2016. A petition for rehearing was denied on May 31, 2016 (Pet. App. 47a-48a). The petition for a writ of certiorari was filed on July 29, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on one count of conspiracy to distribute iodine, knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. 846 and 841(c)(2); one count of conspiracy to distribute chemicals and products that would be used to manufacture

methamphetamine, in violation of 21 U.S.C. 846 and 843(a)(6); two counts of distribution of iodine, knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. 841(c); six counts of distribution of chemicals and products that would be used to manufacture methamphetamine, in violation of 21 U.S.C. 843(a)(6); and one count of distribution of iodine, knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. 841(c). Judgment 2-3. Petitioner was sentenced to 60 months of imprisonment, to be followed by two years of supervised release. *Id.* at 4-5. The court of appeals affirmed in part, reversed in part, vacated in part, and remanded. Pet. App. 1a-34a.

1. Petitioner and his brother ran the Brainerd Army Store, an outdoor-gear retailer in Chattanooga, Tennessee. Petitioner's brother co-owned the store, and petitioner worked as the salaried manager in charge of sales and inventory. The store sold a product called "Polar Pure," a water purifier containing 99% pure iodine crystals. Iodine is an outdated water-purification method, and before 2008 the store apparently sold only small quantities of Polar Pure—for example, the store's records show just two sales during 2007. Pet. App. 2a; Revised Presentence Investigation Report (PSR) ¶¶ 5, 7; Gov't C.A. Br. 4-5.[1]

Iodine is also a precursor chemical used in a popular method of manufacturing methamphetamine, and the pure form of the chemical found in Polar Pure is preferred by illicit methamphetamine cooks because it does not have to be processed before use. In early 2008, petitioner noticed a growing number of "edgy

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[1] References to "Gov't C.A. Br." refer to the government's Corrected Second Brief filed on June 11, 2015.

looking folks" buying Polar Pure at the store, and he called the Chattanooga Police Department to ask whether the iodine in Polar Pure could be used to make methamphetamine. Petitioner ultimately spoke to the Director of the Tennessee Methamphetamine Task Force, who explained that "Polar Pure was being used to manufacture methamphetamine throughout the community and urged [petitioner] not to sell it 'if he felt uncomfortable.'" Pet. App. 2a (brackets omitted); Gov't C.A. Br. 5-6.

Despite that warning, petitioner and his brother continued to sell increasing quantities of Polar Pure to methamphetamine cooks. Pet. App. 2a-3a. They sold more than 2800 bottles in 2008, and more than 13,000 bottles in 2009. Gov't C.A. Br. 4. Polar Pure became the store's highest-grossing item by a large margin, bringing in roughly $400,000 in revenues and $270,000 in profits between 2008 and November 2010. *Id.* at 4 & n.4; see 1/22/14 Trial Tr. 249-252.

Only petitioner and his brother—and not the store's other employees—sold Polar Pure. They kept it hidden behind the counter, so that customers had to ask for it. And although each bottle of Polar Pure contained enough iodine to purify 500 gallons of water, petitioner and his brother sold up to 12 or more bottles at a time and made sales to customers who returned multiple times per week, and even on consecutive days. Pet. App. 2a-3a; Gov't C.A. Br. 6-9.

Between 2008 and 2010, law enforcement officers found Polar Pure in use at illicit methamphetamine labs across the Chattanooga area. The Brainerd Army Store was the area's only supplier of Polar Pure. Officers visited the store several times and tried to convince petitioner and his brother to step selling the

product to methamphetamine cooks, but the brothers refused. When questioned by the officers, petitioner denied recognizing pictures of people who had bought Polar Pure from him multiple times. He also told officers that the store was selling one case of Polar Pure each month when it was actually selling eight. Petitioner would later tell officers that he and his brother had adopted a "don't-ask-don't-tell policy" for iodine sales. Pet. App. 2a-3a; see Gov't C.A. Br. 9-12.

In November 2010, law enforcement officers halted the brothers' distribution of iodine by executing a search warrant at the Brainerd Army Store and seizing its inventory of Polar Pure. Thereafter, methamphetamine labs using iodine—which had previously been common in the Chattanooga area—became "fairly non-existent." Pet. App. 3a.

2. Petitioner and his brother were indicted on conspiracy and substantive charges related to the distribution of chemicals, knowing or having reasonable cause to believe that they would be used to manufacture methamphetamine. Indictment 1-2. The indictment included a forfeiture allegation under 21 U.S.C. 853, which sought a money judgment holding petitioner and his brother jointly and severally liable for $269,751.98 in proceeds from their offenses. Indictment 2-3; see Pet. App. 67a (second superseding indictment including the same allegations).

Petitioner's brother pleaded guilty and agreed to satisfy $200,000 of the forfeiture sought in the indictment. Petitioner proceeded to trial. The jury acquitted him on three substantive counts and convicted on the remaining 11 counts, including both substantive and conspiracy charges. Pet. App. 4a, 39a.

The district court sentenced petitioner to 60 months of imprisonment, 37 months below the applicable Sentencing Guidelines range. Pet. App. 4a; PSR ¶ 44. The court then solicited briefing on the appropriate amount of forfeiture under 21 U.S.C. 853(a)(1), which provides that "[a]ny person convicted of" certain drug offenses "shall forfeit to the United States * * * any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." See 5/12/14 Sent. Tr. 68. The court observed that petitioner's brother had already paid $200,000, but asked the parties to address whether petitioner should be liable for the remaining $69,751.98. *Id.* at 66.

Although petitioner acknowledged circuit precedent holding that co-conspirators are "jointly and severally liable for any proceeds of the conspiracy reasonably foreseeable from conspiratorial operations," he nonetheless argued against any forfeiture. D. Ct. Doc. 107, at 2 (Apr. 14, 2014). He contended (1) that he had not "personally realize[d] any profits" and therefore had not directly or indirectly obtained any proceeds from the sale of Polar Pure; and (2) that imposition of a money judgment would violate the Eighth Amendment's prohibition on excessive fines. *Id.* at 2-6. The government responded that forfeiture of the remaining $69,751.98 was required under Section 853(a)(1). Among other things, the government noted that petitioner had been "directly involved in deriving the proceeds" from the sale of Polar Pure, including by "work[ing] at the cash register" and "mak[ing] the actual sales of iodine." Pet. App. 53a. The government also argued that a forfeiture of $69,751.98 was consistent with the Eighth Amendment

standard articulated in this Court's decision in *United States* v. *Bajakajian*, 524 U.S. 321 (1998). Pet. App. 53a-55a.

The district court declined to impose a forfeiture. Pet. App. 37a. The court stated that the Brainerd Army Store was not a criminal enterprise; that some sales of Polar Pure were probably for legal uses; and that, as a salaried employee with no ownership interest in the store, petitioner had not personally profited from the conspiracy. *Id.* at 38a-40a.

3. Petitioner appealed his convictions, and the government cross-appealed the denial of a forfeiture. The court of appeals affirmed the convictions and reversed the denial of a forfeiture. Pet. App. 24a-29a.[2]

a. The court of appeals explained that the Second, Third, Fourth, and Eighth Circuits have concluded that 21 U.S.C. 853(a)(1) "mandates joint and several liability among coconspirators for the proceeds of a drug conspiracy." Pet. App. 25a-26a. It acknowledged that the D.C. Circuit reached a contrary conclusion in *United States* v. *Cano-Flores*, 796 F.3d 83 (2015), cert. denied, 136 S. Ct. 1688 (2016). Pet. App. 26a. But the court of appeals found it "unnecessary to probe the reasoning of *Cano-Flores*," *ibid.*, because it concluded that it was bound by circuit precedent interpreting the forfeiture provision in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, which likewise requires the forfei-

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[2] The court of appeals also vacated petitioner's sentences on three counts for which the district court had imposed terms above the applicable statutory maximum. Pet. App. 23a, 28a-29a. Because petitioner was sentenced to concurrent terms on all of the counts of conviction, that vacatur did not affect his total term of imprisonment. *Id.* at 23a.

ture of "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from [certain criminal offenses]," 18 U.S.C. 1963(a)(3). Pet. App. 26a-27a.

In *United States* v. *Corrado*, 227 F.3d 543 (6th Cir. 2000), the court of appeals had held that "co-conspirators in a RICO enterprise should be held jointly and severally liable for any proceeds of the conspiracy." Pet. App. 27a (quoting *Corrado*, 227 F.3d at 553). Agreeing with numerous other circuits, *Corrado* reasoned that requiring the government to "prove the specific portion of the proceeds for which each defendant is responsible" would permit defendants "to mask the allocation of the proceeds to avoid forfeiting them altogether." *Ibid.* (quoting *Corrado*, 227 F.3d at 553) (internal quotation marks omitted). In this case, the court concluded that *Corrado* controlled the interpretation of the "virtually identical" forfeiture provision in 21 U.S.C. 853, and it therefore held that petitioner was jointly and severally liable for all of the proceeds of the conspiracy. *Ibid.*

b. Judge Moore concurred in the judgment. Pet. App. 29a-34a. She agreed that the panel was bound by *Corrado*, but she wrote separately to express her agreement with the D.C. Circuit's decision in *Cano-Flores* and "to suggest that the full court consider the issue en banc." *Id.* at 29a.

4. Petitioner sought rehearing and rehearing en banc. After the government filed a response arguing (at 3) that this case "is not a good vehicle" in which to consider the disagreement created by *Cano-Flores*, the court of appeals denied rehearing en banc with no judge requesting a vote. Pet. App. 47a-48a.

ARGUMENT

Petitioner contends (Pet. 9-25) that 21 U.S.C. 853(a)(1) requires a participant in a drug conspiracy to forfeit only the proceeds of the conspiracy that he personally obtained, and not the proceeds foreseeably obtained by his co-conspirators. The court of appeals correctly rejected that argument, as have at least eight other circuits interpreting Section 853(a)(1) or the parallel forfeiture provision in RICO. Petitioner correctly notes (Pet. 13-16) that the D.C. Circuit departed from that consensus view in *United States* v. *Cano-Flores*, 796 F.3d 83 (2015), cert. denied, 136 S. Ct. 1688 (2016). But the resulting circuit conflict is lopsided and recent. And even if that conflict otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to resolve it because petitioner would be liable for the forfeiture the government seeks here even under the rule adopted in *Cano-Flores*. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that, under 21 U.S.C. 853(a)(1), the members of a drug conspiracy are jointly and severally liable for the forfeiture of the reasonably foreseeable proceeds of the conspiracy.

a. Congress enacted Section 853 and RICO's parallel forfeiture provision in the Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, Tit. II, ch. III, 98 Stat. 2040. Congress sought to "enhance the use of forfeiture, and in particular, the sanction of criminal forfeiture, as a law enforcement tool in combatting two of the most serious crime problems facing the country: racketeering and drug trafficking." S. Rep. No. 225, 98th Cong., 1st Sess. 191 (1983) (Senate Report). Under those provisions, forfeiture "operate[s]

as punishment for criminal conduct in violation of the federal drug and racketeering laws." *Libretti* v. *United States*, 516 U.S. 29, 39 (1995).

Section 853(a)(1) provides that "[a]ny person convicted of a violation" of specified drug laws "shall forfeit to the United States," among other things, "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." Congress further provided that the provisions of Section 853 "shall be liberally construed to effectuate its remedial purposes." 21 U.S.C. 853(*o*). As this Court has observed, "Congress could not have chosen * * * broader words to define the scope of what was to be forfeited." *United States* v. *Monsanto*, 491 U.S. 600, 607 (1989).

For example, Congress used "the term 'proceeds' * * * in lieu of the term 'profits'" because it concluded that the government should not have to prove the defendant's "net profits." Senate Report 199. The statute thus requires a defendant to forfeit "all gross receipts" from the criminal offense, "not just the profits." *United States* v. *Olguin*, 643 F.3d 384, 399 (5th Cir.), cert. denied, 132 S. Ct. 432, and 132 S. Ct. 439 (2011).[3] And by providing for the forfeiture of pro-

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[3] With a single exception, every court of appeals to consider the issue has held that Section 853(a)(1) requires the forfeiture of gross receipts rather than net profits. See, *e.g.*, *United States* v. *Bucci*, 582 F.3d 108, 121-124 (1st Cir. 2009); *United States* v. *Casey*, 444 F.3d 1071, 1076 n.4 (9th Cir.), cert. denied, 549 U.S. 1010 (2006); *United States* v. *Keeling*, 235 F.3d 533, 537 (10th Cir. 2000), cert. denied, 533 U.S. 940 (2001); *United States* v. *McHan*, 101 F.3d 1027, 1041-1042 (4th Cir. 1996), cert. denied, 520 U.S. 1281 (1997); but see *United States* v. *Jarrett*, 133 F.3d 519, 530-531 (7th Cir.), cert. denied, 523 U.S. 1112 (1998). Again with the exception of the Seventh Circuit, courts of appeals have likewise held

ceeds "obtained" by a defendant as the result of the offense, the statute reaches not only property that a defendant ultimately retained, but also property that a defendant "held in custody" before transferring it to a confederate. *United States* v. *Hurley*, 63 F.3d 1, 21 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996). Consistent with that broad liability, Section 853 authorizes the imposition of personal money judgments, not just the forfeiture of identifiable property in a defendant's possession. *Olguin*, 643 F.3d at 397 (collecting cases); see 21 U.S.C. 853(p) (permitting the forfeiture of substitute property if the property subject to forfeiture has been transferred or is otherwise unavailable).

b. Section 853(a)(1) does not expressly address the scope of forfeiture liability in conspiracy cases. But a fundamental principle of federal conspiracy law, carried forward from the common law, is that a person who joins a conspiracy "becomes responsible for the acts of his co-conspirators in pursuit of their common plot." *Smith* v. *United States*, 133 S. Ct. 714, 719 (2013). A "conspiracy is a partnership in crime," and "so long as the partnership in crime continues, the partners act for each other in carrying it forward." *Pinkerton* v. *United States*, 328 U.S. 640, 644, 646 (1946). One familiar consequence of that principle is the *Pinkerton* rule, which holds that a defendant who

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that "'proceeds' in the RICO forfeiture statute refers to gross receipts rather than net profits." *United States* v. *Christensen*, 828 F.3d 763, 822-824 (9th Cir. 2015), petition for cert. pending, No. 16-461 (filed Oct. 5, 2016); see, *e.g.*, *United States* v. *Simmons*, 154 F.3d 765, 770-771 (8th Cir. 1998); *United States* v. *DeFries*, 129 F.3d 1293, 1313-1314 (D.C. Cir. 1997); *United States* v. *Hurley*, 63 F.3d 1, 21 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996); but see *United States* v. *Genova*, 333 F.3d 750, 761 (7th Cir. 2003).

joins a conspiracy may be convicted of the "substantive offense[s]" committed by his co-conspirators so long as those substantive offenses were reasonably foreseeable to the defendant and were committed "in furtherance of the conspiracy." *Id.* at 647.

Congress legislates against the backdrop of these "well-established principles," and the legislature should not lightly be assumed to have "erode[d] the common-law principle that, so long as they share a common purpose, conspirators are liable for the acts of their co-conspirators." *Salinas* v. *United States*, 522 U.S. 52, 63-64 (1997); see, *e.g.*, *United States* v. *Lake*, 472 F.3d 1247, 1266 (10th Cir. 2007) ("The liability of coconspirators is a well-entrenched feature of federal criminal law. If Congress wishes to limit it in certain circumstances, we would expect it to be explicit about what it is doing.").

In enacting Section 853(a)(1), Congress did not suggest any intent to depart from settled principles governing co-conspirators' responsibility for each other's acts. To the contrary, Congress broadly provided that a defendant is liable to forfeit any property "obtained, directly *or indirectly*, as the result" of a drug offense. 21 U.S.C. 853(a)(1) (emphasis added). That language readily encompasses the traditional principle that a member of a conspiracy is vicariously liable for the foreseeable acts of his co-conspirators. Accordingly, Section 853(a)(1)'s forfeiture obligation "is not limited to property that the defendant acquired individually but includes all property that the defendant derived indirectly from those who acted in concert with him in furthering the criminal enterprise." *United States* v. *McHan*, 101 F.3d 1027, 1043 (4th Cir. 1996), cert. denied, 520 U.S. 1281 (1997).

At least five other courts of appeals have adopted that view, holding that "[i]n a drug conspiracy case, defendants may be held jointly and severally liable in a money judgment for all of the foreseeable proceeds of the conspiracy." *United States* v. *Elder*, 682 F.3d 1065, 1072 (8th Cir. 2012) (brackets and citation omitted); accord *United States* v. *Roberts*, 660 F.3d 149, 165 (2d Cir. 2011), cert. denied, 132 S. Ct. 1640 (2012); *United States* v. *Pitt*, 193 F.3d 751, 765 (3d Cir. 1999); *United States* v. *Candelaria-Silva*, 166 F.3d 19, 44 (1st Cir. 1999), cert. denied, 529 U.S. 1055 (2000); *McHan*, 101 F.3d at 1043 (4th Cir.).

Numerous courts of appeals have adopted the same interpretation of the parallel RICO forfeiture statute, likewise applying "the familiar rule that a member of a conspiracy is responsible for the foreseeable acts of other members of the conspiracy taken in furtherance of the conspiracy." *Hurley*, 63 F.3d at 22 (1st Cir.); see *United States* v. *Genova*, 333 F.3d 750, 762 (7th Cir. 2003); *United States* v. *Edwards*, 303 F.3d 606, 643-644 (5th Cir. 2002), cert. denied, 537 U.S. 1192, and 537 U.S. 1240 (2003); *United States* v. *Corrado*, 227 F.3d 543, 553 (6th Cir. 2000); *United States* v. *Simmons*, 154 F.3d 765, 769-770 (8th Cir. 1998); *United States* v. *Benevento*, 836 F.2d 129, 130 (2d Cir. 1988); *United States* v. *Caporale*, 806 F.2d 1487, 1507-1508 (11th Cir. 1986), cert. denied, 482 U.S. 917, and 483 U.S. 1021 (1987).[4] And the advisory committee's notes to the Federal Rule of Criminal Procedure gov-

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[4] The Eleventh Circuit has concluded that in some circumstances a co-conspirator may be required to forfeit the proceeds of the conspiracy even if those proceeds were not reasonably foreseeable. *United States* v. *Browne*, 505 F.3d 1229, 1279-1280 (2007), cert. denied, 554 U.S. 918 (2008).

erning forfeiture proceedings likewise recognize that "[c]riminal defendants may be jointly and severally liable for the forfeiture of the entire proceeds of the criminal offense." Fed. R. Crim. P. 32.2(c) advisory committee's note at 144.[5]

As the courts of appeals have explained, a contrary interpretation would severely undermine the purpose of the forfeiture provisions Congress enacted in 1984. Recognizing that a conviction of drug defendants that leaves intact their "economic power base[]" is "of only limited effectiveness," Congress designed forfeiture provisions to "strip these offenders * * * of their economic power." Senate Report 191. And Congress was particularly concerned that existing forfeiture provisions "fail[ed] adequately to address the phenomenon of defendants defeating forfeiture by removing, transferring, or concealing their assets prior to conviction." *Id.* at 195. A requirement that the government "determine the precise allocation" of proceeds among co-conspirators would recreate a version of the same problem, allowing conspirators to "mask the allocation of the proceeds" among themselves and thereby "avoid forfeiting them altogether." *Caporale*, 806 F.2d at 1508. Denying forfeiture because "the government cannot prove exactly which defendant received how much of the pot" would "defeat[] the purpose of the [forfeiture] provision." *Ibid.*

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[5] Other forfeiture statutes contain language similar to that found in Section 853(a)(1) and the parallel provision of RICO. See, *e.g.*, 18 U.S.C. 982(a)(2) (various offenses, including mail fraud, wire fraud, and bank fraud affecting a financial institution); 18 U.S.C. 982(a)(8)(B) (telemarketing fraud); 18 U.S.C. 1030(i)(1)(B) (computer fraud). The government is not aware of any decision rejecting application of co-conspirator liability under those provisions.

Moreover, a contrary interpretation of Section 853(a)(1) would create anomalous results by giving "conclusive weight" to whether a particular co-conspirator "physically handled the money." *Hurley*, 63 F.3d at 22. It would mean, for example, that low-level couriers could be subject to greater forfeitures than "higher level" conspirators who played larger roles in the offense, but handled less of the cash. *Ibid.* Rather than fixing the amount of forfeiture based on "whether an individual co-conspirator happened to possess" the proceeds—a fact that may be "largely fortuitous"—the "foreseeable amount" of proceeds from the conspiracy "represents the sounder measure of liability." *Ibid.*

c. Petitioner identifies no valid reason to abandon the rule of co-conspirator liability that has long prevailed in the vast majority of the circuits.

First, petitioner asserts (Pet. 20-21) that co-conspirator liability is inconsistent with the text of Section 853(a)(1) because a defendant only "obtain[s]" the "proceeds that actually reach that defendant." But Congress imposed forfeiture liability for proceeds that a defendant obtains "directly *or indirectly*." 21 U.S.C. 853(a)(1) (emphasis added). As even petitioner concedes, that language indicates that forfeiture is not limited to proceeds that the defendant *personally* obtains. Petitioner acknowledges, for example, that a defendant "indirectly" obtains proceeds that flow to "persons or entities that are under the defendant's control," or "persons for whom th[e] defendant has a legal or moral obligation of support." Pet. 21 (quoting *Cano-Flores*, 796 F.3d at 92). It is equally sensible to say that when a joint criminal enterprise foreseeably obtains property, all of the co-conspirators "indirect-

ly" obtain those proceeds, without regard to how they then choose to allocate the funds amongst themselves. That is particularly true in light of the settled rule that a conspiracy is a "partnership in crime" in which the members "act for each other in carrying it forward." *Pinkerton*, 328 U.S. at 646.

Petitioner objects (Pet. 22) that Congress did not expressly provide for co-conspirator liability in Section 853. But the rule that "conspirators are liable for the acts of their co-conspirators" is a "well-established" principle of federal criminal law that forms part of the backdrop against which Congress legislates. *Salinas*, 522 U.S. at 63-64. Congress need not expressly provide for co-conspirator liability in each federal criminal statute; to the contrary, Congress is presumed to have incorporated that well-settled background rule absent some indication to the contrary. See *id.* at 64; see also, *e.g.*, *Lake*, 472 F.3d at 1266 (holding that restrictive language in a criminal statute is not "an implied repeal of traditional liability for partners in crime").[6]

Second, petitioner contends that the general principle of co-conspirator liability is inapplicable to forfeitures because "*Pinkerton* * * * is a doctrine which speaks only to a defendant's substantive liability—not to the consequences of such liability."

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[6] Petitioner therefore draws the wrong inference (Pet. 22) from 18 U.S.C. 3664(h), which provides that a court imposing a restitution order may either "make each defendant liable for payment of the full amount of restitution" or "apportion liability among the defendants." That provision shows that Congress can depart from the background rule of co-conspirator liability when it wishes to do so, but Congress's failure to depart from that rule in Section 853 confirms that the usual rule of co-conspirator liability applies.

Pet. 24 (quoting *Cano-Flores*, 796 F.3d at 94). But *Pinkerton* liability for substantive crimes committed by a defendant's co-conspirators is simply one application of the broader principle that a person who joins a conspiracy "becomes responsible for the acts of his co-conspirators in pursuit of their common plot." *Smith*, 133 S. Ct. at 719; see *Pinkerton*, 328 U.S. at 646-647. That principle also applies in other contexts, including in determining the consequences of substantive criminal liability. For example, the Sentencing Guidelines permit attribution to a defendant for sentencing purposes of the reasonably foreseeable conduct of jointly undertaken criminal activity. Sentencing Guidelines § 1B1.3(a)(1)(B). Accordingly, "[i]t would be odd * * * to depart from th[e] principle of attributed conduct when it comes to apply the forfeiture rules, which have aspects of both substantive liability and of penalty." *Hurley*, 63 F.3d at 22.[7]

Third, petitioner contends (Pet. 22-23) that co-conspirator liability is inconsistent with the purpose of Section 853 because requiring a defendant to forfeit money that the defendant did not personally receive makes forfeiture tantamount to a punitive "criminal fine[]." But Section 853's purpose extends beyond

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[7] For much the same reason, petitioner is wrong to assert (Pet. 24) that "joint-and-several liability is contrary to the *Pinkerton* rule" because *Pinkerton* results in individual convictions and sentences rather than joint liability. The underlying principle that co-conspirators are responsible for each other's acts is the same in each context. Joint-and-several liability in the forfeiture context is simply the result of the rule that the government cannot twice collect the proceeds of the offense. See *Hurley*, 63 F.3d at 23 ("The government can collect [the proceeds of a conspiracy] only once but, subject to that cap, it can collect from any [conspirator] so much of that amount as was foreseeable to that [conspirator].").

merely requiring defendants to "give up [tainted] assets, so as not to benefit from [their] crimes" (Pet. 22). As explained above, Section 853(a)(1) requires forfeiture of the gross receipts from criminal activity, not just its net profits; extends to proceeds that the defendant merely held before transferring to others; and permits the imposition of a personal money judgment, not just the forfeiture of specific tainted assets. See pp. 9-10 & note 3, *supra*. As this Court has explained, an "*in personam* criminal forfeiture" like the one at issue here "is clearly a form of monetary punishment" analogous to a "traditional 'fine.'" *Alexander* v. *United States*, 509 U.S. 544, 558 (1993). And although co-conspirator liability can result in "a formidable penalty" under Section 853 and the parallel provision in RICO, "there is no reason to think that this result is unattractive to Congress, which requested a broad construction" of both forfeiture statutes. *Hurley*, 63 F.3d at 23; see 21 U.S.C. 853(*o*).

Finally, petitioner errs in suggesting (Pet. 24-25) that the absence of a federal right to seek contribution from co-conspirators indicates that Congress did not intend to impose joint-and-several liability. Petitioner's argument relies on *Paroline* v. *United States*, 134 S. Ct. 1710 (2014), which relied in part on the absence of a federal right to contribution in holding that Congress did not make every possessor of an image of child pornography jointly and severally liable for the victim's "entire losses." *Id.* at 1725. But the Court rejected joint-and-several liability primarily because that case "d[id] not involve a set of wrongdoers acting in concert" and because joint-and-several liability would have made a single defendant liable for the combined consequences of the acts of "tens of thou-

sands" of "independently acting offenders." *Ibid.* No such incongruity exists in applying the familiar rule that the confederates in a single conspiracy are responsible for each other's foreseeable acts in furtherance of their joint criminal enterprise.

2. Petitioner contends (Pet. 10-18) that this Court should grant review to resolve the circuit conflict created by the D.C. Circuit's decision in *Cano-Flores*. But that lopsided and newly minted split does not warrant this Court's intervention. And even if it did, this case would not be an appropriate vehicle in which to resolve the question presented because petitioner would be liable for the forfeiture the government seeks even under the rule announced in *Cano-Flores*.

a. *Cano-Flores* arose from the prosecution of a "mid-level manager" in the Gulf Cartel, "one of the largest and most infamous drug cartels in Mexico." 796 F.3d at 85, 94. The defendant was convicted of conspiring to manufacture and distribute cocaine and marijuana for importation into the United States, and the district court ordered a $15 billion forfeiture under 21 U.S.C. 853(a)(1). *Cano-Flores*, 796 F.3d at 85, 90. That amount reflected an estimate of the "gross cartel proceeds that were reasonably foreseeable" to the defendant. *Id.* at 90.

The D.C. Circuit vacated the forfeiture order. Acknowledging its disagreement with every other court of appeals to have considered the issue, the D.C. Circuit held that Section 853(a)(1) "does not authorize imposition of a forfeiture based on the total revenues of a conspiracy simply because they may have been reasonably foreseeable." *Cano-Flores*, 796 F.3d at 91. Instead, the court held that Section 853(a)(1) principally encompasses "funds that actually *reach* the de-

fendant." *Id.* at 92. But the court indicated that a defendant "obtain[s]" proceeds for purposes of Section 853(a)(1) even if he serves as an intermediary who passes the funds along to another conspirator. See *ibid.* (explaining that the ultimate recipient in such a transaction obtains proceeds "indirectly" while the intermediary receives the funds "directly").

The D.C. Circuit also acknowledged that its rule could encompass "cases where the flow of funds is a good deal more subtle." *Cano-Flores*, 796 F.3d at 92. The D.C. Circuit suggested, for example, that a defendant may be deemed to have "obtain[ed]" proceeds if she "receiv[ed] increased compensation as an indirect benefit" of the offense. *Ibid.* And the court indicated that a defendant may be regarded as "indirectly" obtaining proceeds even in some circumstances in which the defendant does not personally receive them—for example, where the proceeds are "received by persons or entities that are under the defendant's control" or by family members or other "persons for whom th[e] defendant has a legal or moral obligation of support." *Ibid.*

b. The conflict created by the D.C. Circuit's decision in *Cano-Flores* does not warrant this Court's intervention. *Cano-Flores* involved highly unusual facts and an exceptionally large forfeiture award. The government did not seek rehearing en banc of the panel's interlocutory decision, and no subsequent case has given the D.C. Circuit the opportunity to revisit the panel's interpretation of Section 853(a)(1)—or to apply that interpretation to circumstances involving more typical flows of funds among co-conspirators. Conversely, with the exception of the decision below, no other court of appeals has had the opportunity to

reconsider its interpretation of Section 853(a)(1) in light of *Cano-Flores* or to respond to the D.C. Circuit's arguments. Under the circumstances, this Court's review would be premature.

c. In any event, this case would not be an appropriate vehicle in which to consider the question presented even if that question otherwise warranted this Court's review. The forfeiture the government seeks here would be appropriate even under the standard adopted in *Cano-Flores*, and the resolution of the question presented thus would not affect petitioner's liability.

Petitioner contends (Pet. 19-20) that this case is an appropriate vehicle because he did not have an ownership interest in the Brainerd Army Store and thus did not share in the profits from the store's sales of Polar Pure. But *Cano-Flores* did not hold that a defendant "obtains" the proceeds of an offense only if he is the ultimate financial beneficiary. To the contrary, the D.C. Circuit indicated that a defendant obtains any proceeds "that actually *reach* the defendant," even if the defendant then passes them along to a co-conspirator. 796 F.3d at 92; see *Hurley*, 63 F.3d 21.

That is exactly what happened here. Petitioner was the manager of the Brainerd Army Store "in charge of sales and inventory." Pet. App. 2a. Only petitioner and his brother sold Polar Pure, and the evidence at trial established that petitioner *personally* sold a substantial amount of the iodine distributed during the conspiracy. *Ibid.*; see, *e.g.*, 1/21/14 Trial Tr. 56-57 (petitioner sold four bottles to an undercover officer on October 26, 2009); *id.* at 66-67 (same on November 2, 2009); *id.* at 72-73 (petitioner sold the officer 15 bottles on November 6, 2009); *id.* at 81-82

(same on November 18, 2009); *id.* at 92 (petitioner sold the officer one bottle on November 8, 2010).[8]

Each time petitioner personally made an unlawful sale of Polar Pure, he "directly" obtained the proceeds from that sale. And particularly because the government seeks a forfeiture of only $69,751.98—roughly a quarter of the store's profits from sales of Polar Pure and less than a fifth of its gross receipts, see Gov't C.A. Br. 4—those personal sales alone would provide a sufficient basis for the forfeiture even under *Cano-Flores*'s interpretation of Section 853(a).[9]

Even setting aside petitioner's personal sales, moreover, he would properly be regarded as having "indirectly" received the proceeds of the Brainerd Army Store's sales of Polar Pure even without the application of co-conspirator liability. This is a case involving what *Cano-Flores* termed a "more subtle" flow of funds. 796 F.3d at 92. The conspiracy was run out of a small, family-owned business, and petitioner

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[8] At trial, petitioner asserted that his brother worked the sales counter more often than he did. 1/23/14 Trial Tr. 445-446. But petitioner sold the bulk of the iodine purchased by the undercover officer who testified at trial, and other witnesses who visited the store stated that they found the brothers at the counter in "equal amounts." 1/22/14 Trial Tr. 171; see, *e.g.*, *id.* at 304 (cooperating witness testified that he bought from each brother "on more than one occasion" and could not say which one was at the counter more often).

[9] In this case, the government has sought forfeiture in an amount equal to the profits from the Brainerd Army Store's sales of Polar Pure. Indictment 2. But as the government observed below, Section 853(a)(1) provides for the forfeiture of gross receipts, not merely profits. Gov't C.A. Fourth Br. 7 (citing *United States* v. *Logan*, 542 Fed. Appx. 484, 498 (6th Cir. 2013), cert. denied, 134 S. Ct. 1531 (2014)); see p. 9 & note 3, *supra*.

was directly involved in all of the store's sales of Polar Pure because he was solely responsible for maintaining its inventory. 1/23/14 Trial Tr. 498. Even where petitioner did not personally handle the proceeds of the sales, those proceeds ultimately went to a store owned by his brother. And although petitioner was paid by salary, he received an "indirect benefit" from the sales of Polar Pure, *Cano-Flores*, 796 F.3d at 92, which became the store's top-selling and most-profitable product and contributed substantially to its total revenue, 1/22/14 Trial Tr. 249-252. This case is thus far removed from *Cano-Flores*, which involved a $15 billion forfeiture imposed on a mid-level member of a vast conspiracy involving "tens of thousands" of other participants. 796 F.3d at 90. The D.C. Circuit's vacatur of the forfeiture award at issue there does not suggest that it would conclude that a $69,751.98 forfeiture is inappropriate under the very different circumstances presented here.

At a minimum, these complications would make this case a poor vehicle in which to resolve the disagreement created by *Cano-Flores*. At the panel stage, Judge Moore expressed her agreement with *Cano-Flores* and "suggest[ed] that the full court consider the issue en banc." Pet. App. 29a. But after the government highlighted the vehicle problems described above in its response to a petition for rehearing en banc (at 3-6), the court of appeals denied rehearing en banc with neither Judge Moore nor any of her colleagues requesting a vote. Pet. App. 47a-48a. Even if this Court were otherwise inclined to take up the question presented, it should likewise await an appropriate vehicle.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2016